degrees. The true test would seem to be whether different grades of punishment are assessed for different grades of the crime. *Loften* v. *State,* 121 Ga. 172, 48 S. E. 908; *Benbow* v. *State,* 128 Ala. 1, 29 So. 553. Such reasoning, applied to the principal case, would reverse the decision, because there is a difference between the punishment inflicted for an attempt to commit burglary in the daytime and in the nighttime.

Once determined that, in contemplation of the statute, an attempt to commit burglary is divided into degrees, and the conclusion is clear. The overwhelming weight of authority is that a verdict failing to find the degree of the crime as required by statute is fatally defective. *Tully* v. *People,* 6 Mich. 273; *State* v. *Reddick,* 7 Kan. 143; *Kirby* v. *State,* 15 Tenn. 259.

But even if it be conceded that, according to a strict construction of the statute, attempts to commit burglary are not divided into degrees, still the reasoning of the principal case is not entirely unimpeachable. It has often been held, irrespective of statutes, that the record of conviction should point out with precision the sentence or judgment the court should inflict. *Neville* v. *State,* 26 Ark. 614; *Thomas* v. *State,* 38 Ga. 117; *Thomas* v. *State,* 5 How. (Miss.) 20. In none of these cases was the decision based on statutes requiring the jury to find the degree (apparently no such statutes existed), but on the rule that the verdict must guide the court as to the penalty to be imposed. Surely, in Montana, a verdict of guilty of attempt to commit burglary does not show the court what punishment should be inflicted. But we must not disregard the strong argument of the majority opinion that the presumption favors the proceedings of the lower court and that, in the absence of the record giving all the evidence, it will be presumed that the proceedings were in accordance with the evidence. *State* v. *Shepphard,* 23 Mont. 323, 58 Pac. 868; *State* v. *Gordon,* 35 Mont. 458, 90 Pac. 173. Hence it will be presumed that the trial judge was justified in inflicting the punishment he did. In a state where there is no reversal unless prejudice is actually shown, such an argument is very strong. S. W. D.

GRANTOR'S REMEDY ON BREACH OF CONDITION SUBSEQUENT.—In *Mash* v. *Bloom* (1907), — Wis. —, 114 N. W. Rep. 457, the court holds (SIEBECKER and TIMLIN, JJ., dissenting) that one, having conveyed real property subject to a condition subsequent, has no right of action to recover possession on breach of the condition until he has taken "advantage of condition broken and so notified the defendant, either by demand of possession or some other act equivalent to a re-entry for condition broken."

The plaintiff had made a deed of conveyance of the premises in question in consideration of $1.00, natural love and affection, and upon the "special considerations and conditions" that defendant and his wife should care for the plaintiff and administer to her natural wants "as good, loving, affectionate and kind children would do for a parent." The plaintiff had previously sought by a suit in equity to enforce her rights under the deed, and had asked to have it cancelled as a cloud on her title, but the court had held that she had a complete and adequate remedy at law and might enforce her rights

in ejectment without resorting to equity: *Mash* v. *Bloom,* 110 N. W. Rep. 203, 268. The parties had appeared before the court on the same matter several times (see 105 N. W. Rep. 831; 114 N. W. Rep. 99), so that the defendant had had notice of the nature of the plaintiff's demands. A statute of the state provides (St. Wis. 1898, § 3079) that it shall not be necessary for a plaintiff in ejectment "to prove an actual entry under title nor the actual receipt of any profits of the premises demanded, but it shall be sufficient for him to show a right to the possession of such premises at the time of the commencement of the action as heir, devisee, purchaser or otherwise." Therefore, the circumstances of the case seem to have been such as to warrant the court in disregarding the ancient rule which required a re-entry by the grantor upon breach of a condition before bringing an action to recover possession.

It was certainly true once that no estate of freehold could be made to cease, without entry, upon the breach of a condition: an estate of freehold could not begin nor end without ceremony (*Co. Litt.* 214 b.); and recent decisions, other than those cited by the majority of the court in the principal case, may be found sustaining the proposition that there must be a re-entry by the plaintiff, or at least a demand of possession and refusal by the defendant if peaceable re-entry cannot be made. (See, for example, *Randall* v. *Wentworth* (1905), 100 Me. 177, 60 Atl. 871; *Moss* v. *Chappell,* 126 Ga. 196, 54 S. E. 968; *Preston* v. *Bosworth,* 153 Ind. 458, 55 N. E. 224, 74 Am. St. Rep. 313.)

On the other hand, either because of statutes not unlike that of Wisconsin, or because of the implied or express confession of lease, entry and ouster in the action of ejectment, it is held in other recent decisions that an actual entry for condition broken is no longer necessary, but that ejectment will lie, without demand of possession or notice. Under the Washington statute, for instance (Ball. Co. § 5500), providing that one having a valid interest in real property and a right to possession may maintain ejectment, it is held that neither entry nor demand of possession prior to the commencement of an action to recover property for breach of condition is essential. *Lewiston Water & Power Co.* v. *Brown,* 42 Wash. 555, 85 Pac. Rep. 47. And it was expressly held in *Trustees of Union College* v. *City of New York* (1903), 173 N. Y. 38, 65 N. E. 853, 93 Am. St. Rep. 569, that proof of demand of possession before commencing the action of ejectment on breach of condition was unnecessary, and in *Gray* v. *C. M. & St. P. Ry. Co.,* 189 Ill. 400, the plaintiff was apparently permitted to sue at once upon breach of the condition. The prevailing doctrine seems to be that the "commencement of the action stands in lieu of entry and demand of possession." *Cowell* v. *Springs Co.,* 100 U. S. 55; *Sioux City and St. P. R. Co.* v. *Singer,* 49 Minn. 301, 51 N. W. 905, 15 L. R. A. 751, 32 Am. St. Rep. 554; *Ritchie* v. *Kan. N. & D. R. Co.,* 55 Kan. 36; *Austin* v. *Cambridgeport Parish,* 21 Pick. 215; *Brown* v. *Bennett,* 75 Pa. St. 420.